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In the
COURT OF CRIMINAL APPEALS OF TEXAS
At Austin

VITAL GARCIA

VS.

THE STATE OF TEXAS

Appealed From the
District Court of Harris County, Texas
179TH Judicial District Court
Cause No. 1533080

APPELLANT'S REPLY BRIEF FOR DISCRETIONARY REVIEW

ORAL ARGUMENT NOT REQUESTED

SHARON E. SLOPIS,
Attorney at Law
P.O. Box 66710
Houston, Texas 77266
(713) 529-0771
T.B.N.: 18511300
E-mail: seslopis@yahoo.com

ATTORNEY FOR APPELLANT

IDENTITY OF PARTIES AND COUNSEL

Pursuant to Tex. R. App. P. 38.1(a), the following persons are interested parties:

Presiding Judge At Trial

The Honorable Judge Marc Brown
179th Judicial District Court
1201 Franklin
Houston, Tx 77002

Attorneys for State

Ms. Katherine Thomas & Ms. Whitney Raspberry (at trial)
Assistant D.A.
1201 Franklin
Houston, Tx 77002

Ms. Heather A. Hudson (on appeal)
Assistant D.A.
1201 Franklin
Houston, Tx 77002

Appellant

Mr. Vital Garcia

Attorneys for Appellant

Mr. Ricardo Gonzalez (at trial)
Attorney at Law
8876 Gulf Fwy. Suite 420
Houston, Texas 77017-1402

Ms. Sharon E. Slopis (on appeal)
Attorney at Law
P.O. Box 66710
Houston, Texas 77266

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

STATEMENT OF THE CASE

This appeal lies from the Appellant's conviction for Aggravated Assault of a Family Member, Serious Bodily Injury, with a Deadly Weapon. (C.R. 187-88). Appellant pleaded “true” to an enhancement allegation of a prior felony conviction for indecency with a child, and he was sentenced to thirty-five years of imprisonment at the Institutional Division of the Texas Department of Criminal Justice. (C.R. 187).

Appellant filed an appeal challenging the sufficiency of the evidence to show the complainant suffered serious bodily injury. The court of appeals issued a published opinion reversing the judgment of conviction and remanding the case to the trial court with instructions to reform the judgment to reflect a conviction for the offense of second-degree aggravated assault and to conduct a new hearing on punishment.

STATEMENT OF PROCEDURAL HISTORY

On August 10, 2021, a majority panel of the Fourteenth Court of Appeals issued a published opinion concluding that the evidence is insufficient to support the jury's finding that the complainant suffered serious bodily injury, but sufficient to establish the elements of aggravated assault. The majority opinion reversed the judgment of conviction and remanded the case to the trial court to reform the judgment to reflect a conviction for second-degree aggravated assault. *See Garcia*

v. State, 631 S.W.3d 875 (Tex. App.—Houston [14th Dist.] 2021, pet. granted). A dissenting opinion was filed by Justice Poissant.

The State’s petition for discretionary review was granted on November 10, 2021.

REPLY TO APPELLEE’S GROUND FOR REVIEW

The Fourteenth Court of Appeals properly determined that the injuries suffered by the complainant “as inflicted, not after the effects have been ameliorated or exacerbated by medical treatment”, were such that they did not meet the definition of "serious bodily injury," as defined by the Texas Penal Code Sec. 1.07(a)(46). *See Blea v. State*, 483 S.W.3d 29, 33 (Tex. Crim. App. 2016).

ARGUMENT AND AUTHORITIES

In concluding that the evidence is insufficient to support the jury’s finding that the complainant suffered serious bodily injury, the panel majority properly determined that the injuries suffered by the complainant “as inflicted, not after the effects have been ameliorated or exacerbated by medical treatment”, were such that they did not meet the definition of "serious bodily injury," as defined by Texas Penal Code§ 1.07(a)(46). *Blea v. State*, 483 S.W.3d 29, 33 (Tex. Crim. App. 2016).

I. *Statement of Facts.*

At trial, the first witness called by the State was Marissa Melendez, the complainant. (R.R.III., 15). She explained that she was in a dating relationship

with the appellant, and she identified him wearing a checkered black and white T-shirt. (R.R.III., 16). She explained that they lived together and that the incident happened at Dairy Ashford and Bissonnet, in Harris County, Texas. (R.R.III., 18).

On May 25, 2016, she had no special plans and called Myrick to come over. (R.R.III., 21). She called him because he was supposed to bring her some marijuana. (R.R.III., 22). She explained that she had a dating relationship with him in the past. (R.R.III., 22). She explained that the appellant came home early that day, and that she and Myrick sat down and “rolled one up” and were smoking one together, when the appellant came home. (R.R.III., 23).

The complainant was nervous when the appellant came in because she had someone in their home. (R.R.III., 24). She explained that the appellant went straight to the restroom, cocked the gun and pointed it and she tried to get away. (R.R.III., 27). She was shot in the right thigh trying to get into the kitchen. (R.R.III., 28). The appellant held her hostage in the kitchen, then shot her in the chest. (R.R.III., 29). The complainant testified that she was bleeding from her injuries and she attempted to clean off the blood before driving herself to the hospital. (R.R. III.,33-34)

When she was in her car, the complainant was not a block away and she saw a police car. (R.R.III., 36). She told the police that she had been shot and needed help and she did not think she would make it to the hospital. (R.R.III., 36). She indicated that she did not have surgery. (R.R.III., 39). She explained that she

“went out” after she got in the ambulance and that she still has scars from the incident. (R.R.III., 40).

The complainant explained that she had been smoking weed or marijuana, since she was a little girl, 13 years old. (R.R.III., 48). She explained that she bought the weed with money that the appellant gave her. (R.R.III., 50). She agreed that she could have stayed with her grandma or lived with her mom, but she chose to stay with the appellant. (R.R.III., 52, 53).

Dr.. Jordan Smith, with Signature Care Emergency Group, explained that the complainant had wounds to her right breast as well as her right thigh and they were gunshot wounds. (R.R.IV., 37). They washed four wounds and closed them via staple closure. (R.R.IV., 38). He stated that he considered Ms. Melendez’s gunshot wounds to be serious bodily injury. (R.R.IV., 39). He explained that if one of her vital organs was hit, Ms. Melendez could have suffered death. (R.R.IV., 40). On cross, Dr. Smith indicated that none of the complainant’s vital organs were hit by the 2 bullets. (R.R.IV., 41). The Doctor agreed that the complainant entered the emergency department at approximately 18:17 and left at 21:37, the same day. (R.R.IV., 42). The Doctor agreed that the complainant was in the hospital for only a few hours. (R.R.IV., 42). He agreed that it’s possible for someone to suffer serious bodily injury or death if a bullet hits a vital organ. (R.R.IV., 42).

Dr. Johnson stated that Ms. Melendez was instructed to have the staples

removed in 10 days, and commonly, that would leave a scar. (R.R.IV., 44).

The Defense made a Motion for a Directed Verdict, noting that the State failed to meet the burden of proof beyond a reasonable doubt. (R.R.IV., 45). Specifically, the Defense noted that the State failed to prove the serious bodily injury element of the indictment because the doctor testified that none of the bullets went through any of the organs. (R.R.IV., 45).

The Court denied the Motion for Instructed Verdict. (R.R.IV., 46).

II. *The majority panel properly applied the correct standard of review in determining that the injuries suffered by the complainant “as inflicted, not after the effects have been ameliorated or exacerbated by medical treatment”, were not “serious bodily injury” as defined by the Texas Penal Code Sec. 1.07(a)(46). See Blea v. State, 483 S.W.3d 29, 33 (Tex. Crim. App. 2016).*

The majority panel properly applied the correct standard of review in concluding that “the State failed to present evidence demonstrating that appellant caused complainant to ‘suffer serious bodily injury.’” *Garcia*, 631 S.W.3d at 880. Further, the majority panel properly considered the disfiguring and impairing quality of the bodily injuries as they were inflicted on the complainant by the offender, *not after the effects have been ameliorated or exacerbated by medical treatment*, in determining whether the bodily injuries created a substantial risk of death. *See Blea v. State*, 483 S.W.3d 29, 33 (Tex. Crim. App. 2016).

“Serious bodily injury” is defined as “bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted

loss or impairment of the function of any bodily member or organ.” Tex. Penal Code § 1.07(a)(46).

The relevant inquiry is the degree of risk posed and the disfiguring and impairing quality of the injury as inflicted, not after the effects have been ameliorated or exacerbated by medical treatment. *See Blea*, 483 S.W.3d at 34- 35.

The record reflects that the injuries suffered by the complainant as inflicted, not after the effects have been ameliorated or exacerbated by medical treatment, were not “serious bodily injury” as defined by the Texas Penal Code Sec. 1.07(a)(46). The reasons are as follows.

1. After the shooting, the complainant was able to walk out of the apartment, get in her car after gathering her keys, wallet and cell phone, and drive her car. (R.R.III., 34).
2. The complainant was in the hospital for only a few hours. (R.R.IV., 42).
3. The complainant did not have surgery. (R.R.III., 39). *Webb v. State*, 801 S.W.2d 529, 533 (Tex.Crim.App.1990) (the necessity of surgery, alone, is insufficient to establish serious bodily injury).
4. There was no evidence of serious permanent disfigurement, although the injuries may have left scars. (R.R.IV., 44). “Simply that an injury causes a scar is not sufficient to establish serious permanent disfigurement”. See *McCoy v. State*, 932 S.W.2d 720, 724 (Tex.App.--Fort Worth 1996, pet. ref'd)(slight scar on the lip,

though permanent, was not sufficient to show serious permanent disfigurement). There must be evidence of some significant cosmetic deformity caused by the injury. See e.g., *Brown v. State*, 605 S.W.2d 572, 575 (Tex.Crim.App.1980) (testimony that broken nose would cause disfigurement and dysfunction if untreated sufficient to establish serious bodily injury); *Moore v. State*, 802 S.W.2d 367, 369 (Tex.App.--Dallas 1990, pet. ref'd)(sufficient evidence of serious bodily injury where victim's cheek bone was fractured in three places; surgery necessary to prevent significant cosmetic deformity); *Pitts v. State*, 742 S.W.2d 420, 421-22 (Tex.App.--Dallas 1987, no pet.) (evidence of significant disfigurement where victim suffered five fractures in the facial area necessitating several surgeries to repair the damage).

Furthermore, as previously noted, the relevant issue in determining the degree of disfigurement is the damage caused by the wound when inflicted, not disfigurement as exacerbated or ameliorated by medical treatment. *Brown*, 605 S.W.2d at 575; *Moore*, 802 S.W.2d at 370; *Goodman v. State*, 710 S.W.2d 169, 170 (Tex.App.--Houston [14th Dist.] 1986, no pet.).

4. There was no evidence that the actual flesh wounds suffered by Ms. Melendez, (wherein *none* of her vital organs were hit,) created a substantial risk of death, or that the complainant would have died without treatment.

5. There was no evidence that Ms. Melendez, the complainant, was restricted in any particular physical activity.

6. There was no evidence offered of impairment of a member or organ.
7. There was no evidence that Ms. Melendez, the complainant, was unable to return to work.
8. Gunshot wounds do not constitute serious bodily injury per se. *Williams v. State*, 696 S.W.2d 896, 898 (Tex. Crim. App. 1985).
9. The majority opinion properly discounts the evidence of the complainant's blood loss because the record does not reflect the amount of blood lost and there is no indication in the medical records that she received a blood transfusion. *See Garcia*, 631 S.W.3d at 880.
10. The majority opinion properly rejected the complainant's testimony that she "went out" after entering the ambulance because her testimony was contradicted by EMS records, which notes that she was "conscience [sic] and alert" at the location. (R.R. VI. SX 46 at pp. 58, 61). *See Garcia*, 631 S.W.3d at 880.
11. The majority opinion properly discredits the complainant's testimony that she thought she was going to die because she failed to clarify whether she was expressing a generalized fear of death or giving an assessment of her injuries. *Garcia*, 631 S.W.3d at 880.
12. The majority opinion properly rejects the expert testimony of the complainant's treating physician that the gunshot wounds constituted serious

bodily injury because he was not specifically questioned about the statutory criteria for serious bodily injury. *See Garcia*, 631 S.W.3d at 881.

13. There was no probative evidence from which the trier of fact could infer beyond a reasonable doubt that the complainant's loss of blood created an appreciable risk of death.

14. There was no evidence from which the trier of fact could infer beyond a reasonable doubt that the injuries themselves created an appreciable risk of death. (In the instant case, Dr. Jordan explained that *if one of her vital organs was hit*, Ms. Melendez could have suffered death. (R.R.IV., 40)).

15. The State is required to prove serious bodily injury under section 1.07(a) (46) of the Texas Penal Code. *Sizemore v. State* 387 S.W.3d 824, 828 (Tex. App.—Amarillo 2012, pet.ref'd)(Simply that an injury causes scarring is not sufficient. [I]nstead, [a court] must find in the record evidence of 'some significant cosmetic deformity' in order to conclude that the evidence of serious bodily injury [is] sufficient. *At* 829: Likewise, the necessity of surgery alone is insufficient to establish serious bodily injury.)

16. In *Blea v. State*, 483 S.W.3d 29, 34 (Tex. Crim. App. 2016), the court held that in determining whether a bodily injury creates a substantial risk of death, a court should apply the *Brown* standard that considers the disfiguring and impairing quality of the bodily injury as it was inflicted on a complainant by an offender. *Brown*, 605 S.W.2d at 575. The Court correctly applied the *Brown*

standard in the instant case, finding the evidence insufficient to prove serious bodily injury as inflicted, not after the effects have been ameliorated or exacerbated by medical treatment.

The *Garcia* Court noted:

Evidence showed that the two bullets passed through complainant's right thigh and right breast, but there was no evidence that they hit any vital organs or caused any serious or lasting impairment or disfigurement. The shots did not knock appellant down, and she was immediately able to gather her things, walk to her car, and drive away. Complainant drove for about a block before happening upon police officers. She said that at first, she thought she could make it to the hospital on her own but then changed her mind. She was bleeding but there is little evidence to indicate how much blood she lost. There is no indication in the medical records that she received a blood transfusion. Complainant stated that she thought she was in shock and that she "went out" once she got into the ambulance, but the EMS records reflect that she was alert and conscious at the scene and her condition did not change during transport. Complainant further said that at one point, she thought she was going to die. *See generally Hart v. State*, 581 S.W.2d 675, 677 (Tex. Crim. App. 1979) (panel op.) (explaining that a complainant is qualified to express an opinion regarding the seriousness of her injuries). But she was not asked to and did not explain the basis for that feeling, whether it was just a fear or whether it was an assessment of her physical condition.

Complainant also mentioned that she had scars from the wounds, but she did not describe the scars and the scars were not shown to the jury either in person or in photographs. The simple fact that some scarring occurred is not alone sufficient to support a finding of serious bodily injury. *See, e.g., Sizemore v. State*, 387 S.W.3d 824, 828 (Tex. App.-Amarillo 2012, pet. ref'd); *see also Wade v. State*, 594 S.W.3d 804, 811 (Tex. App.-Austin 2020, pet. granted) ("Rather, '[t]here must be evidence of some significant cosmetic deformity caused by the injury. '" (quoting *Hernandez v. State*,

946 S.W.2d 108, 113 (Tex. App.-El Paso 1997, no pet.)). Complainant did not mention any loss or impairment of the function of any bodily member or organ. . . .

Garcia, 631 S.W.3d at 877

17. The dissenting opinion *incorrectly* applies a deferential standard of review because the injuries suffered by the complainant 1) *do not* meet the definition of “serious bodily injury” as defined by Texas Penal Code§ 1.07(a)(46) and 2) do not compare in severity to the injuries suffered by the complainant in *Blea v. State*, 483 S.W.3d 29, 34 (Tex. Crim. App. 2016) (holding that the evidence was sufficient to prove serious bodily injury where the complainant was 1) admitted into a hospital where she remained for four days, during which time she was treated for a collapsed lung with the insertion of a chest tube., 2) her injuries additionally included a lacerated liver, two rib fractures, a fractured maxillary sinus bone and 3) due to these injuries, the complainant was unable to return to work for approximately a month.)

18. The dissenting opinion paraphrases Dr. Jordan Smith’s testimony out of context and in a misleading manner, stating:

(4) Dr. Smith, a specialist in emergency medicine, testified based upon the location of the gunshot wound, he considered the wound as "serious bodily injury"; and

(5) Dr. Smith had seen multiple deaths occur from gunshots in the chest area and that the location of either gunshot wound could have caused the Complainant's death.

Garcia, 631 S.W.3d at 881 -883 (Poissant, JI, dissenting).

There is no evidence that Dr. Smith testified that the *actual wounds* suffered by the complainant could have caused the Complainant's death and the record reflects that Dr. Smith did not remember having seen deaths occur from being shot in the thigh area. (R.R.IV. -40)

Further, the record reflects that Dr. Smith qualified his statements that the location of the gunshot wounds could have caused the Complainant's death, *if a vital organ had been hit*, in the following manner:

Q And can you explain to the jury what vital organs are close to where Ms. Melendez suffered the gunshot wound through her chest?

A Through her chest, you know, just underneath her breast are ribs, obviously a lot of vessels right underneath the ribs as well as in her thorax, obviously her lungs and her heart. You know, my primary concern as an emergency physician would be did this hit her lung, causing a collapsed lung or bleeding in the thorax. Did this hit her heart or her major artery, her aorta or her vena cava. So those are our primary concerns at the outset.

Q If one of those vital organs would have been hit, could she have died?

A Yes.

Q And can you explain to the jury what vital organs are close to the area where Ms. Melendez was shot in her thigh?

A Sure. Her femur, the bone in the thigh; as well as major arteries and veins,

the femoral artery and femoral vein; as well as nerves that go down.

Q And if one of those vital organs was hit, could she have suffered death?

A Yes.

Q Approximately how many gunshot wounds would you say you've treated over the years of you being a doctor?

A Hundreds.

Q And out of those hundreds, have you seen death occur?

A Yes.

Q Have you seen deaths occur from being shot in the thigh area?

A Not that I remember specifically.

(R.R.IV.-39, 40).

The record reflects that none of the complainant's vital organs were hit and the Doctor did not remember having seen a death occur from being shot in the thigh area. (R.R.IV.-39, 40)

The burden of proof is on the State to prove each and every element of the offense beyond a reasonable doubt. *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d ~08 (1975); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Wright v. State*, 603 S.W.2d 838 (Tex. Crim. App. 1980). Tex. Penal Code Ann. Sec. 2.01. The standard of review on appeal is whether a rational trier of fact could have found each element of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979);

McGoldrick v. State, 682 S.W.2d 573 (Tex. Crim. App. 1985); *Jackson v. State*, 672 S.W.2d 80, (Tex. App. – Houston [14th Dist.] 1993, pet. ref’d.) .

The State failed to prove “serious bodily injury” as defined by the Texas Penal Code § 1.07(a)(46) for the reasons listed above. The evidence, when viewed in light of the requirements of section 1.07(a)(46), and in the light most favorable to the verdict, is insufficient to prove the element of serious bodily injury. Consequently, a rational trier of fact *could not have found* beyond a reasonable doubt that the gunshot wounds suffered by the complainant constituted “serious bodily injury” as defined by the Texas Penal Code § 1.07(a)(46).

The Fourteenth Court of Appeals majority properly evaluated the case on its facts in determining that the complainant’s injuries were such that they did not meet the definition of "serious bodily injury," as defined by the Texas Penal Code § 1.07(a)(46). See *also Williams* 696 S.W.2d at 897-98 (holding evidence was insufficient to prove bullet wound constituted serious bodily injury where no testimony was offered suggesting the complainant suffered either a substantial risk of death or a serious permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ); *Black v. State*, 637 S.W.2d 923, 926 (Tex. Crim. App. 1982) (holding evidence was insufficient to prove bullet wound caused serious bodily injury where although complainant was in the hospital for three days and took two to three months to heal, there was no evidence of the severity of the wound or any permanent damage); *Hollaway v. State*, 446 S.W.3d

847, 852 (Tex. App.- Texarkana 2014, no pet.) (holding evidence was insufficient to support finding that abdominal stab wound was serious bodily injury where the complainant was not shown to have suffered either internal injuries or complications even though paramedic testified that the injury was a very serious type of injury).

Viewing the aforementioned evidence in the light most favorable to the verdict, a rational trier of fact could NOT have found beyond a reasonable doubt that the gunshot wounds suffered by the complainant constituted serious bodily injury.

PRAYER FOR RELIEF

WHEREFORE PREMISES CONSIDERED, Appellant prays this Honorable Court to affirm the judgment of the Fourteenth Court of Appeals, thereby reversing the judgment of conviction and remanding the case to the trial court with instructions to reform the judgment to reflect a conviction for the offense of second-degree aggravated assault and to conduct a new hearing on punishment.

Respectfully submitted,

/s/Sharon Slopis

SHARON E. SLOPIS,
ATTORNEY AT LAW
P.O. Box 66710
(713) 529-0771
Houston, Texas 77266
TBN: 18511300

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2022, a copy of the foregoing instrument has been submitted for service by e-filing to the following addresses:

Heather A. Hudson
Assistant District Attorney
Harris County, Texas
State Bar No. 24058991
1201 Franklin, Suite 600
Houston, Texas 77002
Tel.: (713) 274-5826
HUDSON_HEATHER@DAO.HCTX.NET

Stacey M. Soule
State Prosecuting Attorney
Austin, Texas
(512) 463-1660
[stacey.soule@spa.state.tx.us](mailto:STACEY.SOULE@SPA.STATE.TX.US)

/s/Sharon Slopis

SHARON E. SLOPIS,
Attorney At Law
P.O. Box 66710
(713) 529-0771
Houston, Texas 77266
email: seslopis@yahoo.com
TBN: 18511300

ATTORNEY FOR APPELLANT

CERTIFICATE OF COMPLIANCE

I hereby certify that on January 7, 2022, I filed a Certificate of Compliance as required by Texas Rule of Appellate Procedure 9.4(i)(3), stating the word count of 3,681, as represented by the word-processing program used to create the Reply Brief for Discretionary Review filed for the Appellant. This document complies with the typeface requirements in Rule 9.4(e), as it is printed in a conventional 14-point typeface.

/s/ Sharon E. Slopis

SHARON E. SLOPIS,
ATTORNEY AT LAW
P.O. Box 66710
(713) 529-0771
Houston, Texas 77266
email: seslopis@yahoo.com
TBN: 18511300

ATTORNEY FOR APPELLANT

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Sharon Slopis
Bar No. 18511300
seslopis@yahoo.com
Envelope ID: 60607838
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Associated Case Party: Vital Garcia

Name	BarNumber	Email	TimestampSubmitted	Status
Sharon Slopis		seslopis@yahoo.com	1/7/2022 1:11:43 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Heather Hudson	24058991	hudson_heather@dao.hctx.net	1/7/2022 1:11:43 PM	SENT
Dan McCrory		MCCRORY_DANIEL@dao.hctx.net	1/7/2022 1:11:43 PM	ERROR
Stacey M.Soule		stacey.soule@spa.state.tx.us	1/7/2022 1:11:43 PM	SENT
Sharon Slopis		seslopis@yahoo.com	1/7/2022 1:11:43 PM	SENT